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AN ENHANCED CONCEPTION OF THE BANKRUPTCY JUDGE: FROM CASE ADMINISTRATOR TO UNBIASED ADJUDICATOR

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This article is intended to provide the practitioner with an understanding of some of the considerations and circumstances which have helped define the extent of power of Bankruptcy Judges. Many of these considerations are unarticulated. It is the thesis of this article that in the Bankruptcy Reform Act of 1978, Congress established two principles, difficult at first glance to reconcile. On one hand, Congress has now increased the powers of Bankruptcy Judges in most respects. But on the other hand, Congress severely restricted the extent to which judges may properly become involved in those portions of bankruptcy cases which are administrative and which were traditionally regarded by the Bankruptcy Judges as critically important. This article suggests that the Bankruptcy Judges have resolved this apparent dichotomy by stretching the interpretations of the laws expanding their powers generally in order to include an extension of their rights to continue to be involved in administration.

INTRODUCTION

For more than 81 years, bankruptcy cases were administered by so-called "referees" in bankruptcy.¹ Each referee held what was then most charitably described as a quasi-judicial

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¹ Bankruptcy Act of 1898, ch. 541, §§ 33-43, 30 Stat. 555 (1898) [Hereinafter cited as Bankruptcy Act], amended by, 11 U.S.C. §§ 62-72 (1976), repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (1978) [Hereinafter cited as Reform Act], codified at 11 U.S.C. §§ 101-151326 (Supp. III 1979). References to the former Bankruptcy Act include citations to the parallel provisions of 11 U.S.C. With the passage of the Bankruptcy Reform Act of 1978, the former provisions of Title 11 were replaced by new provisions of Title 11. Unlike the situation with the Bankruptcy Act, the section numbers of the new Bankruptcy Code match the section numbers of the newly amended Title 11.

role. Subject in every meaningful respect to the United States District Courts in their respective districts,² it was the referees' duty to resolve certain controversies which arose in bankruptcy cases. However, they acted without all of the powers—and without any of the prestige—accorded to other judges in the federal judicial system. They did not generally wear robes; they were frequently addressed by the awkward and almost Dickensian title of "Referee" (as in, "Good morning, Referee"); their powers to control the parties in front of them, other than by force of personality, were doubtful;³ the reputation and abilities of many of the practitioners who appeared before them was less than salutary; the presence of a stenographer at hearings was frequently regarded as a marvel; and the route for claiming and perfecting an appeal, at least until 1973, was frustrating and frequently Augean.⁴

In 1973 the Supreme Court attempted to enhance the referees' powers and prestige by officially permitting them to be called judges.⁵ In 1978, the Congress took a hand as well: it passed, on November 6, 1978, effective October 1, 1979, the Bankruptcy Reform Act.⁶ The Reform Act turned the world of bankruptcy upside down, or at least atilt. Although the Reform Act significantly changed much substantive bankruptcy law, it also changed the role of the bankruptcy judge—into which referees have now metamorphasized. However, the attorney who is just entering the practice of bankruptcy must know not only the "new ways", *i.e.*, those prescribed under the Reform Act, in which Judges conduct cases but also must know the "old ways." Most incumbent bankruptcy judges were trained in the "old ways", and where a proposed action which a lawyer is seeking varies from custom, the lawyer should be aware of that fact and be guided in his or her actions by it. Most courts have accepted

² Bankruptcy Act, § 38, *amended by* 11 U.S.C. § 66, *repealed by*, Reform Act.

³ The power to punish for contempt was limited to \$250. FED. R. BANKR. P. 920(a)(3). *See* Bankruptcy Act, § 41(a), *amended by* 11 U.S.C. § 69a, *repealed by* Reform Act.

⁴ Appeal was by the unusually cumbersome process of a "petition for review" to the United States District Court. Bankruptcy Act, § 39(c), *amended by* 11 U.S.C. § 67(c), *repealed by* Reform Act. In 1973, the filing of a notice of appeal became the method. FED. R. BANKR. P. 801(a).

⁵ FED. R. BANKR. P. 901(7), 902(4).

⁶ Pub. L. No. 95-598, *codified at* 11 U.S.C. §§ 101-151326.

the changes, with greater or lesser willingness than others, but the old practices still rule from their resting places—and a lawyer who is unaware of the old habits and laws may jeopardize his⁷ client's interests if he is too precipitous.

The thesis of this article is that the Congress intended that Bankruptcy Judges were suppose to be involved in resolving formal disputes and, with few exceptions, nothing else. "Bankruptcy judges, relieved of administrative responsibilities, will take a more passive role, consistent with their judicial responsibilities, which will serve to eliminate the institutional bias that exists in the bankruptcy system today."⁸ Congress contemplated that Bankruptcy Judges are neither required nor permitted to superintend a case generally, and that they have no responsibility for the general financial health of those cases pending before them. They are expected to rule only on the basis of what emanates from the witness stand or in formal pleadings and to take no notice of whatever economic fate may befall the debtors who appear before them.

Nevertheless, many judges resist such a drastic concept of their duties and responsibilities for varying motives, and the ethical attorney who wishes to argue only from matters in evidence may not always find such a practice easy. More critically, the Reform Act has appeared to create immense gaps with which many judges are uncomfortable. The result has been, as this article suggests, a type of often well-meaning vigilantism on the part of the judges, where the judges have determined to seize the power to control all aspects of cases. With few exceptions, the motivations of these courts have not been power for its own sake. Rather, because of discomfort with the statutory scheme established by Congress, the most common motive for the activism is the fear that without daily judicial involvement, cases will collapse. The judges feel a duty to prevent this. The

⁷ For stylistic reasons only, attorneys and judges are referred to as "he." This coincides with the statistical reality—of the 269 bankruptcy judges in the United States, only 3 are women. Although there are no statistics on attorneys who practice regularly in bankruptcy court, in the author's experience, women do not account for more than 1% of this population.

⁸ H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 101 (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS at 6063 [hereinafter cited as House Report to the page in U.S. CODE CONG. & AD. NEWS].

problem is that in the absence of statutory authority for this kind of activity, a momentum will develop where the habit of ignoring Congress in one respect infects other areas as well.

HISTORICAL BACKGROUND OF BANKRUPTCY ADMINISTRATION

The system of referees was initiated in 1898.⁹ Their functions, in the context of administering bankruptcy cases, did not change appreciably until 1979.¹⁰ It is these years of momentum which still present so important a phenomenon. A bankruptcy case has two major components from the perspective of the bench and bar: administrative and judicial. Until 1979, the referees' responsibilities included all administrative matters within a case. More accurately stated, neither the statutes nor the Rules of Bankruptcy Procedure¹¹ excluded any part of a case from the judge's responsibility.

Therefore, what constituted administration usually was irrelevant to the practitioner or, for that matter, to the court, since the court assumed total responsibility of the case. The Reform Act changed that. The distinction between judicial and administrative functions is now completely relevant. For that reason, a delineation of some of the functions that bankruptcy judges were formerly required to undertake now becomes critical.

THE ADMINISTRATIVE ROLE OF BANKRUPTCY JUDGES

The most common area where the judge's administrative and

⁹ Bankruptcy Act, § 33, *amended by* 11 U.S.C. § 61, *repealed by* Reform Act. See *Peck v. Richter*, 217 F. 880 (8th Cir. 1914).

¹⁰ It is true that the Bankruptcy Rules, promulgated in 1973 and 1974, did provide the judges with a theoretical right to try jury cases, unless either an alleged bankrupt, in the case of a contested involuntary petition, or a local rule of the United States District Judge, demanded otherwise. FED. R. BANKR. P. 115(b), 927. However, virtually no bankruptcy judge has in fact presided over a jury case.

¹¹ The Rules of Bankruptcy Procedure were promulgated by the Supreme Court of the United States pursuant to 28 U.S.C. 2075 (Supp. III 1979). As that statute provided up to October 1, 1979, any conflicts between the Rules and the Bankruptcy Act were resolved in favor of the Rules, except that the Rules were not to alter the substantive rights of parties. Effective October 1, 1979, conflicts between the Rules and the Bankruptcy Code are to be resolved in favor of the Code. Reform Act, § 247. The Bankruptcy Rules were first promulgated in 1973 and 1974.

judicial duties overlap was in the area of Chapter XI cases.¹² Chapter XI was a provision of the old Bankruptcy Act which provided an opportunity for a debtor to make an arrangement with its unsecured creditors for compromising debts.¹³ A Chapter XI case under the Act began, as does a Chapter 11 case under the Code, by the filing of a petition.¹⁴ Under the Bankruptcy Act, a Chapter XI petition could only be voluntary;¹⁵ a petition under Chapter 11 of the Code can be either voluntary or involuntary.¹⁶

The goal of a Chapter XI was, and is, intended to be final acceptance by creditors and confirmation by the Court, of a Plan of Arrangement—under the Code, a Plan of Reorganization.¹⁷ Between the time of the initial filing and the time that a debtor's plan was approved by the creditors and then confirmed by the court, the debtor was, colloquially speaking, said to be "in" Chapter XI. This entailed significant responsibilities both for the debtor and the court; it is this area which most involved the concept of "administration." While a debtor operated its business in Chapter XI, its ongoing expenses became expenses of administration, and as such were entitled to be paid as a priority, *i.e.*, ahead of general, unsecured creditors.¹⁸ Precisely because these expenses were supposed to be a priority, judges became very involved in the determination as to whether a debtor was operating profitably.

The reason for the judges' concern was, from their point of view, simple: if a debtor operated at a loss, then the general reputation of bankruptcy courts would be disgraced. If post-petition creditors, *i.e.*, those who extended credit to a debtor

¹² Chapters of the former Bankruptcy Act were written in Roman numerals, of the present Bankruptcy Code, in arabic numerals.

¹³ Bankruptcy Act, § 306(1), *amended by* 11 U.S.C. § 706(1), *repealed by* Reform Act.

¹⁴ Bankruptcy Act, §§ 321-22, *amended by* 11 U.S.C. §§ 721-22, *repealed by* Reform Act, § 301.

¹⁵ Bankruptcy Act, §§ 321-23, *amended by* 11 U.S.C. § 721-23, *repealed by* Reform Act.

¹⁶ Reform Act, §§ 301, 303(a).

¹⁷ Bankruptcy Act, §§ 361-62, *amended by* 11 U.S.C. § 716-62, *repealed by* Reform Act.

¹⁸ Bankruptcy Act, § 64(a)(1), *amended by* 11 U.S.C. § 104(a)(1), *repealed by* Reform Act.

after the filing of the petition, began to believe that in a particular judicial district dealing with debtors made no economic sense because of the minimal chance of repayment, then debtors generally within that district would find it hard to obtain post-petition credit and to continue operations. A correlative issue was the fear that ongoing losses would diminish the assets of the estate, thus causing creditors to receive less of a dividend than they would have had the debtor been liquidated immediately. Since the judge was the most visible presence, he feared that he would be tagged with the blame in the press, for instance, in the event of a collapse of a Chapter XI proceeding.

The problem remained of how a judge could ascertain whether or not the cases were operating at a reasonable level. For instance, if a debtor was engaged in ongoing operations, did that debtor have insurance? Was it paying its rent on time? These were the kinds of issues which judges superintended quite carefully. It should be apparent, however, that not everyone agreed on the necessity for judges to hold formal hearings in order to ascertain the answers to these questions. Some judges and lawyers thought a telephone conversation or a chambers conference with the debtor or the debtor's counsel could be sufficient to learn this information. If a receiver had been appointed, then that same kind of conversation could take place with the receiver.¹⁹

The problem, of course, was that many of these conversations were *ex parte*. It was therefore possible for a party, either deliberately or inadvertently, to give a judge a general impression of a case, portions of which that same judge may later have to resolve in a contested proceeding. For example, although many judges have argued that such conversations were neutral, it is also true that by the very act of becoming familiar with a debtor and its problems through the eyes of the debtor, or

¹⁹ One of the criticisms of bankruptcy judges had been that they appointed the same receiver repeatedly. In many districts that was true, but often the judges were motivated by the assurance that certain receivers could be counted upon to avoid embarrassment. The receiver upon whom the judge could rely to detect the first danger signals of a collapsing Chapter XI proceeding and so advise the judge was the most valuable type of receiver. In any event, under the Bankruptcy Code the appointment of "receivers" is illegal. Reform Act, § 105(b). The appointment of trustees is not. Reform Act, §§ 701, 1104, 15701, 151014.

through the eyes of a receiver, the judge was hearing considerable extra-evidentiary material which would give the judge a "slant" on the case, and on the problems which the debtor or receiver may be having. If litigation later arose between the debtor or receiver and some other party, such as a secured creditor, then that other party began the litigation with the disadvantage of having a judge sympathetic to the debtor. In some cases, of course, the familiarity may have given the debtor the disadvantage, but the principle was the same. Of more concern for a litigant, the judge may have heard or seen things of which one of the litigants would be unaware.

Under this system, the habit developed, among certain judges and certain lawyers who ordinarily would have considered themselves ethical, of conferring with bankruptcy judges from time to time on the progress of a case. As the House of Representatives said, "[i]t is not uncommon to see a trustee enter a courtroom, for a hearing on a matter, from the judge's chambers, followed closely by the judge himself."²⁰

Totally separate from the evils of *ex parte* communications was the phenomenon of judges becoming involved in matters which were burdensome, and which did not really require the presence of a judicial officer. For instance, monitoring business operations was not a responsibility traditionally ascribed to judges in our system of jurisprudence. Some of these phenomena also partook of some of the evils of *ex parte* communications. Perhaps the clearest example of this was the so-called "First Meeting of Creditors," provided by section 55 of the Bankruptcy Act.²¹ This was a hearing at which the creditors had the right, as a group, to interrogate the debtor or bankrupt under oath, with the judge presiding. Every lawyer who represented a client in a bankruptcy case filed before October 1, 1979, has been exposed to at least one of these hearing, at which the debtor or bankrupt was interrogated, usually by a trustee or by creditors, in the presence of the judge.

Although in a very few districts the judge participated relatively actively, in most districts the inquiries were pro forma,

²⁰ House Report, *supra* note 8, at 6051.

²¹ 11 U.S.C. § 91, *repealed by* Reform Act.

boring, and generally without need of the presence of a judicial officer. Nevertheless, the statute required the judges to be present, and so they were. Worse, if the judges were paying attention, they would frequently hear things which could poison their minds on particular issues, without any rule of evidence being applied. Frequently the questions were asked by angry creditors, sometimes without counsel. Based on the initial impressions at this hearing, judges might even have made "rulings" from the bench, notwithstanding that nothing was pending before them. The rationale for these meetings was, of course, that the questions would elicit information which would aid the trustee in discovering assets. Further, the meetings provided the creditors with a cathartic method of venting their frustration in a particular case. From the judge's point of view, he was merely moving the case along, but from the point of view of a creditor or a debtor, a ruling had been made under circumstances as far from being judicial as possible.

It is not uncommon for a bankruptcy judge to be unable to recall, when called upon to resolve a dispute or find facts after a trial, whether the information on which he is basing a decision was heard at the first meeting of creditors, during the judge's extensive *ex parte* contacts with the trustee and with counsel during the administration of the case, or during the actual trial on the issue presented for decision. It is a fundamentally unfair system that channels inadmissible evidence to the arbiter that must decide disputed issues.²²

For all of the above reasons, and more, Congress decided that the procedures involved in bankruptcy cases needed drastic reform, and so it passed the so-called Bankruptcy Reform Act of 1978, the substantive provisions of which were contained in Title I thereof. The Bankruptcy Code rested on a fundamental premise that bankruptcy judges should no longer be involved in the administration of cases. The premise was specifically that bankruptcy judges should act like, sound like, and be, "real" judges. To foster this goal the jurisdiction of bankruptcy judges was significantly expanded, but their powers to handle administrative matters were significantly reduced. It is in this lat-

²² House Report, *supra* note 8, at 6051.

ter approach that the greatest responsibility on the bar was intended to rest. This goal was expressed by the original Commission on Bankruptcy Laws:

When litigation does arise, there are substantial reasons for not entrusting its determination to bankruptcy judges involved in the prior administration of these litigated estates. It is necessary and important that the adversaries have confidence that their controversy will be determined by evidence adduced by them and presented to the trier of the law and the facts. The Commission is convinced that referees' participation in administrative aspects of bankruptcy proceedings tends to impair the litigants' confidence in the impartiality of the tribunals' decision.²³

In other words, the former Bankruptcy Act contained absolutely no limitations as to the areas of interest in which judges could become involved: sales, abandonments of assets, verifying the accuracy of exemptions, insuring successful business operations in Chapter XI cases, all were within the scope of a judge's duties.

By removing judges from administrative duties, and by expanding their powers, Congress hoped to increase the quality of Bankruptcy practice.

LIMITATIONS ON BANKRUPTCY JUDGES' ADMINISTRATIVE ROLE AND THE JUDGES' RESPONSES

One of the keystones of the change, as it affects administration, is Section 102(1)(B) of the Bankruptcy Code, which defines the term "After notice and hearing."

Section 102(1) reads as follows:

(1) after notice and a hearing, or a similar phrase—

(A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

²³ Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., 5 (1973), *reprinted in* COLLIER ON BANKRUPTCY, Appendix 2, at 5 (15th ed. 1981) [Hereinafter cited as Commission Report].

- (B) authorizes an act without an actual hearing if such notice is given properly and if—
- (i) such a hearing is not requested timely by a party in interest; or
 - (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.²⁴

Many provisions of the Bankruptcy Code require that an act be done only after "notice and a hearing." Specifically, these words only afford an opportunity for a hearing, where an objection to contemplated action is made.

The particularly significant aspect of section 102, and that aspect which is most important as a practical matter, is subsection 1(B)(i), the gist of which—at least as Congress intended it—was that as to any act which can be done "after notice and a hearing" the court is not to become involved at all *unless* there is an objection.

If there is no objection to the proposed action, the action may go ahead without court action. This is a significant change from present law [*i.e.*, before the new Bankruptcy Code], which requires the affirmative approval of the bankruptcy judge for almost every action. The change will permit the bankruptcy judge to stay removed from the administration of the bankruptcy or reorganization case, and to become involved only when there is a dispute about a proposed action, that is, only when there is an objection. The phrase 'such opportunity for a hearing as is appropriate in the particular circumstances' is designed to permit the Rules and the courts to expedite or dispense with hearings when speed is essential.²⁵

There are at least 59 separate sections of the Bankruptcy Code which provide for acts to be done "after notice and a hearing." Most require action by the court, but a few of them require action by others, and it is these which Congress has maintained shall be performed without involvement of the court unless the parties request hearing. Simply stated, Congress believed that if a matter was not being contested, no judicial duties were being evoked.

²⁴ Reform Act, § 102(1).

²⁵ House Report, *supra* note 8, at 6272.

Probably the most dramatic example involves the sale of assets outside of the ordinary course of business. The provisions which permit sales are in section 363 of the Bankruptcy Code: "The trustee, after notice and a hearing may use, sell, or lease, other than in the ordinary course of business, property of the estate."²⁶ The words are simple, but what they mean is that if proper notice of a sale is given, and there is no objection, then there is no reason for a court to become involved. That of course means that there will be no court order approving the sale. This has concerned many persons whose lives are affected by a bankruptcy, including purchasers and title examiners.

The Bankruptcy Act, by contrast, required advance approval for a debtor to effect a sale and then a separate order of the court confirming the sale.²⁷ Title examiners understood that if a bankruptcy appeared in the chain of title, they had certain documents to find—election or appointment of trustee, the trustee's bond and the approval thereof, and an order confirming sale. Once found, the chain of title was clean. However, this last landmark is no longer available. Rather, if the debtor gives notice of a sale, and if no objection is filed, then the sale will be consummated in the ordinary course and will be binding.

Two other provisions of the Bankruptcy Code permit parties other than the court to take an action after notice and hearing: Section 554(e), abandonment of property by the trustee; and Section 725, trustee's right to dispose of property in which an entity other than the estate has an interest, such as property subject to a security interest, or property co-owned by the bankrupt estate and another entity. A related section, although not circumscribed by the words "notice and hearing," is section 522(1), which provides that a debtor's claimed exemptions are valid, without the need for an imprimatur of the court, unless objection thereto is filed.

²⁶ Reform Act, § 363(b).

In a Chapter 11 proceeding, the debtor in possession has the same rights as a trustee, for all practical purposes. Reform Act, § 1107(a).

²⁷ FED. R. BANKR. P. 606; Bankruptcy Act § 70(f) and (g), amended by 11 U.S.C. § 110(f) and (g), repealed by Reform Act. See 4B COLLIER ON BANKRUPTCY ¶ 1180 (14th ed. Dec. 1981 Cum. Supp.).

The gap in these proceedings is obvious to a thoughtful practitioner. If the judge cannot become involved in the sale of assets absent an objection, then who can determine whether a notice is adequate? What would be the effect, for instance, if several years after a sale, a creditor alleged that it did not receive notice of a contemplated sale or did not receive it timely? What if the debtor can prove that the notice given was adequate? To whom would this proof be presented? A state court? Would the bankruptcy court have to reopen the case and adjudicate the matter? One alternative is to have the Bankruptcy Judge rule in advance that the proposed notice is adequate, but that brings the Judge right back into the procedure—a procedure which appears administrative.

One judge has developed a system where notices of proposed sales will indicate a time and place for a hearing, for which the judge will be available if called upon, to consider objections to the sufficiency of the notice. Substantive objections are, of course, set down for hearing consistent with Section 102. Some attorneys have even suggested the desirability of collusive, *i.e.*, insincere, objections in order to gain the imprimatur of a court on a proposed sale. In some districts within the country, however, title examiners have begun to accept the idea that they are no more entitled to court orders approving sales in bankruptcy cases than they are in seeking court orders in most jurisdictions approving sales from probate estates.

A related set of statutory provisions relates to the power of the court to act *sua sponte*. Under the Act, when a court observed a problem, it could act quickly to remedy it, such as by dismissal or adjudication.²⁸ However, the Code significantly reduces the right of a court's power to act *sua sponte*. Throughout the Bankruptcy Code are various sections providing that action may be taken after notice and hearing "on request of a party in interest."²⁹ The significance of this language was stated unequivocally by both the Senate and House floor leaders:

²⁸ Bankruptcy Act § 376, amended by 11 U.S.C. § 776, repealed by Reform Act.

By "adjudication" is meant the termination of a Chapter XI proceeding and the change to a litigation proceeding.

²⁹ The phrase "party-in-interest" is not defined in the Code.

[t]he phrase 'on request of a party in interest' or a similar phrase, is used in connection with an action that the court may take in various sections of the Code. The phrase is intended to restrict the court from acting *sua sponte*. Rules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question, but the court will not be permitted to act on its own.³⁰

The particular sections thus affected—fifty-seven in all—include some matters basic to the ongoing questions of a case, but as to which any action by the court is *forbidden* in the absence of a request by a party-in-interest. Some of the forbidden actions:

§ 303(g). Appointment of interim trustee while involuntary case is pending.

§ 366(b). Downward modification of deposit for utility company in order to prevent termination of service to debtor.

§ 706(b). Conversion of case from Chapter 7 to Chapter 11.

§ 727(c)(2) and § 15727(a)(2). Ordering trustee or U.S. Trustee to examine acts of debtor to determine if grounds exist for denial of discharge.

§ 1104(a). Appointment of trustee in Chapter 11.

§ 1104(b). Appointment of examiner in Chapter 11.

§ 1105. Termination of trustee's appointment.

§ 1112(b). Conversion or dismissal of a case under Chapter 11.

§ 1307. Conversion or dismissal of a case under Chapter 13. The clear reading of these sections, therefore, is that no matter how egregious may be the behavior which a court witnesses, it can do nothing on its own.

The reason this aspect of the statutory scheme has become controversial is that Congress rested on a premise which many judges believe is unfounded. As Congress found, the *sua sponte* and *ex parte* activity by courts deprived litigants, including creditors, of the right to have their matters heard on a regular, unbiased basis. It also found that judges were becoming involved in non-judicial concerns. However, that finding assumed that there would be creditors—and creditors' committees—who would be actively involved in monitoring a case, bringing mat-

³⁰ 124 CONG. REC. 11090, 17407 (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 6437, 6508.

ters to the court's attention in a more "pure" and public manner, to wit, by pleadings.

What has happened in fact, however, is that in a significant number of cases there is no creditor interest in monitoring the case at all.³¹ In some cases, the amount of secured indebtedness is so large that there will be nothing for unsecured creditors in any event. Hence, whether a case makes or loses money is of little consequence to these creditors who are "under water." In other situations, there may be virtually no creditors at all. For instance, a Chapter 11 petition will occasionally be filed under circumstances which, under the Bankruptcy Act, would have evoked a Chapter XII filing, *e.g.*, where a debtor owns nothing but a single piece of real estate and has as its only creditor a mortgagee. The mortgagee does not care whether the debtor is making or losing money. As long as the mortgage payments are being met, from whatever sources, or as long as there is an ongoing court proceeding seeking permission to foreclose, the mortgagee is content. The profitability of the debtor's operations is insignificant.

A report filed by the Attorney General of the United States pointed out that in eighteen judicial districts, including some of the largest ones in the country, creditors' committees had only been formed in fifty percent of the cases. Since these eighteen districts represented districts monitored by the United States Trustees, the assumption is that the rate of activity of creditors' committees in non-United States Trustee districts is considerably less.³²

The first question frequently asked is how did Congress permit this gap? If creditors do not exist, or are inactive,³³ then is it not anomalous to forbid a court to act on the evidence of its own eyes? The answer is that, as so often occurs in the legislative process, it happened because of accident and the exigencies of

³¹ "Report of the Attorney General on the United States Trustees System Established in the Bankruptcy Reform Act of 1978 for the Period October 1, 1979 to September 30, 1980."

This report was presented to the President, the Congress and the Judicial Conference pursuant to the new act. Reform Act § 408(a).

³² *Id.*

³³ House Report, *supra* note 8, at 6053.

time. There was considerable pressure to have the Reform bill passed. As the Reform Act was winding its way through Congress, the House of Representatives version contemplated that the administrative responsibilities formerly undertaken by the judges would be the responsibility of federal officials called United States Trustees.³⁴ Accordingly, the vacuum which was created by removing from judges the responsibility of anything sounding like administration was filled by these new federal officials called United States Trustees. They could occupy the lacunae created when judges were removed.

For various reasons, including a feared loss of patronage on the part of the judges, a compromise was struck, literally at the last minute. The United States Trustees' involvement was reduced from one which was all-encompassing, to a pilot program encompassing eighteen judicial districts.³⁵ Because this was accomplished so late, however, Congress did not have the opportunity to fill the void created when the United States Trustee program was withdrawn from the remaining seventy-eight districts. Thus, the rest of the proposed statute remained untouched, and it is that legacy under which the judges operate today.³⁶

Another provision which may become controversial, although its genesis was uncontroversial, is section 105, which provides: "The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."³⁷ That section was based on section 2(a)(15) of the Bankruptcy Act which had provided that a bankruptcy court may "make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this [Bankruptcy] Act: *Provided, however* That an injunction to restrain a court may be issued by the judge only."³⁸

³⁴ H.R. 8200, 95th Cong., 1st Sess. § 224 (1977), *reprinted in* COLLIER ON BANKRUPTCY, Appendix 2, at 558-63.

³⁵ House Debate, 124 CONG. REC. 11077-78 (1978), *reprinted in* COLLIER ON BANKRUPTCY, Appendix 2, at IX-62 to -66.

³⁶ At the end of this article is a brief description of the functions of the United States Trustees.

³⁷ Reform Act § 105.

³⁸ Bankruptcy Act § 2(a)(15), *amended by* 11 U.S.C. § 11(a)(15), *repealed by* Reform Act § 105.

On an initial reading, former section 2(a)(15) and new section 105 seem relatively similar. However, the interpretation which some courts have been placing upon section 105 arguably far transcends the scope of authority which either section 2(a)(15) or section 105 contemplated. Because of the concern which some judges feel about "runaway" cases, *i.e.*, those "crying" for judicial intervention, some judges have seized upon section 105 as the complete solution to all problems. Although Congress constricted the right of the courts to administer cases, it expanded their jurisdiction substantively. A brief look at this expansion may be useful, particularly because the expanded jurisdiction relates to section 105 as it is currently understood.

In the Reform Act, Congress added a new section which reads in relevant part: "(b) . . . The district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11 [the Bankruptcy Code] or arising in or related to cases under Title 11."³⁹ Section 1471(c) specifies that all of the jurisdiction which a district court is given under the bankruptcy laws shall be exercised by the bankruptcy court. Section 1471(d) gives the bankruptcy court unbridled and unappealable discretion to abstain from any matter. The massive scope of section 1471(c) cannot be overemphasized. For all practical purposes, the bankruptcy judges have virtually the same authority as judges appointed under Article III of the Constitution. They can try jury cases;⁴⁰ they can punish contempts, albeit not with imprisonment;⁴¹ they can issue writs of habeas corpus;⁴² and they can adjudicate the merits of virtually any dispute if one of the parties to that dispute is a debtor.

Perhaps the clearest example of how this differs from the old Act is that the new law abrogates the distinction between summary and plenary jurisdiction. The Bankruptcy Act and the cases under it had left no doubt that a bankruptcy court's jurisdiction rested on possession or ownership of the debtor's property.⁴³ Thus, if the debtor or trustee wished to recover assets from a non-bankrupt party, such as by bringing an action to recover a preference or a fraudulent transfer, that action

³⁹ 28 U.S.C. § 1471(a) (Supp. III 1979).

⁴⁰ 28 U.S.C. § 1480.

⁴¹ 28 U.S.C. § 1481.

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⁴³ See 8 COLLIER ON BANKRUPTCY 156-63 (14th ed. 1981).

would have to be brought in United States District Court, or in a state trial court—almost anywhere, in fact, except in the bankruptcy court. The bankruptcy court's jurisdiction was described as "summary," compared with the "plenary" jurisdiction of the other courts. If a party had not consented to jurisdiction of the bankruptcy court, such as by filing a claim, then the bankruptcy court could acquire no summary jurisdiction over it. Many articles were written, and cases decided, on this summary-plenary dichotomy.⁴⁴ All of that has been abolished by section 1471.⁴⁵ There are virtually no exclusions to the court's new powers: anti-trust cases, determinations of taxes, and even divorce cases could—theoretically—be tried by a bankruptcy judge. For obvious reasons, it is unlikely that a judge would really try a divorce case, but there is no explicit statutory prohibition against this.

How does this relate to section 105? In deciding specific issues, many courts have started with the proposition that their jurisdiction is unlimited. They next look at section 105, which sounds broad, and in a kind of synergy have begun to develop a concept of almost unlimited power. The use of section 2(a)(15) of the Act had been not to expand the court's jurisdiction, but to give it the right to issue orders in aid of the jurisdiction—subject to legal principles—which it already had. In fact, the House Committee report makes clear that section 105 was modeled after the All Writs Statute.⁴⁶ That law, which permits courts of the United States⁴⁷ to issue all writs necessary or appropriate in aid of their jurisdiction, never contemplated an enhancement of jurisdiction thereby. Rather it intended to permit courts to ex-

⁴⁴ The Bankruptcy Commission found that this litigation was among the most frequent in bankruptcy. Commission Report, *supra* note 23, at 90 (citing J. MACLACHLAN, LAW OF BANKRUPTCY § 24 (1956)).

⁴⁵ House Report, *supra* note 8, at 6400-01.

⁴⁶ 28 U.S.C. § 1651.

"Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651, under which the new bankruptcy courts are brought by an amendment to 28 U.S.C. 451. H.R. 8200 § 213. The section is repeated here for the sake of continuity from current law and ease of reference and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute." House Report, *supra* note 8, at 6273-74.

⁴⁷ Bankruptcy courts are courts of the United States for the purposes of interpreting Title 28, but only after April 1, 1984. Reform Act, §§ 213 and 402(b).

ercise their authority within whatever jurisdiction is found elsewhere.⁴⁸

Cases in which the use of section 105 has been quite broad include *First Mortgage Corp. v. Walker (In re Walker)*,⁴⁹ in which a mortgagee asserted a right to relief from the automatic stay provided under section 362 because the court had not entered an order within 30 days from the date of the mortgagee's filing of its complaint for relief, as required by section 362(e) of the Code. The court found that relief from the stay would impede the debtor's plan even though the statutory deadline had not been met. Accordingly, the court refused to grant relief from the stay, citing section 105 and the "broad range of discretionary authority" provided generally in Chapter 13.

In re Howell,⁵⁰ involved an objection by the United States Department of Labor to an order directing it to withhold a fixed amount of wages from one of its employees in aid of a debtor's plan under Chapter 13. Under prior law, the government had been exempt from this sort of order. In interpreting the applicability of the Bankruptcy Code, and in ruling against the Department, the court rested not merely on the substantive provisions of the Code, but also on section 105:

If U.S.C. § 1325(b) is not itself sufficient authority to support the income deduction order herein, there can be no doubt that § 105(a) of the Code and §§ 1471(a) and (e) of Title 28 of the United States Code give the Court authority to issue the challenged orders. . . . Section 105(a) is an intentionally broad grant of authority to the United States Bankruptcy Courts to facilitate the orderly administration of bankruptcy cases . . . The power contained in § 105 is arguably more extensive than that contained in All Writs Statute, 28 U.S.C. § 1651. . . . Section 105 complements the all encompassing grant of jurisdiction now contained in 28 U.S.C. § 1471. . . .⁵¹

The "bootstrap" effect of section 105 was probably most vividly employed in *In re Coram Graphic Arts*,⁵² where the prin-

⁴⁸ See, e.g., *Edgerly v. Kennelly*, 215 F.2d 420 (7th Cir. 1954).

⁴⁹ 3 Bankr. 213 (Bankr. W.D. Va. 1980).

⁵⁰ 4 Bankr. 102 (Bankr. M.D. Tenn. 1980).

⁵¹ *Id.* at 105.

⁵² 11 Bankr. 641 (Bankr. E.D.N.Y. 1981).

cipal of a corporate debtor in Chapter 11 failed to obtain counsel after she had been instructed by the court to do so. The court thereupon issued an "order to show cause"⁶³ advising the debtor and the creditors' committee that there would be a hearing on the dismissal of the debtor's Chapter 11 petition. The debtor failed to appear, and the court dismissed the Chapter 11 proceeding *sua sponte*. The decision does not reflect why the creditors' committee did not itself file a motion to dismiss.

The court first expressed concern whether he had the right to dismiss a proceeding *sua sponte*, even though the facts—which included flagrant disobedience of a court order and refusal to appear at a hearing—would clearly have supported a dismissal if one had been requested by a party in interest. The court found that he did have such a right, but based it not so much on the peculiar exigencies of the facts, but on section 105 itself. The court acknowledged that the early Senate draft of section 1112(b) of the Reform Act had included the following language: "the court may at any time, on its own motion or on the motion of a party in interest," convert or dismiss a case.⁶⁴ Acknowledging that the House amendment to that provision and the final bill itself deleted that language, the court found that no explicit reason for the deletion had been articulated by the Congress, and that therefore the deletion of the language was insignificant.⁶⁵ The court stated that it could rely on its "inherent power" as a court of equity. It then cited cases decided under the former Bankruptcy Act in support of its powers to dismiss a Chapter 11 proceeding. Many of the cited cases did not involve *sua sponte* issues at all. Other cases were cited for the proposition that a court could, under the Bankruptcy Act, have dismissed a Chapter 11 proceeding *sua sponte*.

The latter cases were important to the decision because the court found that section 105(a) was intended by Congress to "cover any powers traditionally exercised by a bankruptcy court

⁶³ "Orders to show cause" are a peculiar invention of bankruptcy courts, frequently held in disrepute. They are still employed in some districts, are always issued ex parte, and are directed to parties ordering them to appear in court to show cause why a particular action should not be taken.

⁶⁴ 2266, 95th Cong., 2d Sess. § 1112(b) (1978), reprinted in COLLIER ON BANKRUPTCY, Appendix 2, at 519.

⁶⁵ 11 Bankr. at 643.

⁶⁶ *Id.* at 644.

that are not encompassed by the All Writ Statute."⁵⁶ Acknowledging that a court should not invoke its power to dismiss a Chapter 11 proceeding *sua sponte* "whenever the Court is not satisfied with the debtor's progress toward a successful reorganization,"⁵⁷ the court asserted that each use of this power "must be determined on a case-by-case basis with due weight given to the specific facts and equities of the case."⁵⁸

Finally, the court also found that it had power to dismiss a case under section 305 of the Bankruptcy Code "if the interests of creditors and the debtor would be better served by such dismissal."⁵⁹ In answer to the proposition that section 112(b) specifically limited the right of dismissal or conversion to requests by "parties in interest," and therefore constituted a limitation on the general dismissal provisions of section 305,⁶⁰ the court quoted the following language from an earlier case: "The whole thrust of the Bankruptcy Reform Act of 1978 is to expand the jurisdiction of the bankruptcy court, not to restrict it. It follows that 11 U.S.C. Section 305 does not restrict my power to dismiss, but rather enlarges it."⁶¹ The *Fast Food Properties* opinion itself, other than that portion which sets forth the provisions of section 305, is approximately a half page in length. Citing two cases, it merely proclaims the proposition for which it is cited in *Coram*.

The first case cited is *In re Ettinger*,⁶² also cited in *Coram*. However, *Ettinger* did not in fact involve a *sua sponte* order, thus the reference to a court's ability to dismiss a case *sua sponte* was dictum. In addition, the actual facts in *Ettinger* involved the jurisdiction of the court, i.e., whether the debtor fit

⁵⁷ *Id.*

⁵⁸ *Id.* at 644-45.

⁵⁹ *Id.* at 645.

⁶⁰ The legislative history of section 305 indicates that it was intended for use in unusual situations, such as where a debtor and virtually all creditors agree in response to an involuntary petition that the debtor can best resolve its problems outside of bankruptcy. Nothing in the legislative history suggests that it was intended as a supplement to section 112. House Report, *supra* note 8, at 6281; Senate Report, *supra* note 8, at 5821-22.

⁶¹ *In re Fast Food Properties, Ltd.*, 5 Bankr. 539 (Bankr. C.D. Cal. 1980), cited in 11 Bankr. at 645.

⁶² 76 F.2d 741 (2d Cir. 1935).

within the scope of statutory permission to use the Bankruptcy Act at all.⁶³ In the only other case cited in *Fast Food Properties*, the facts did not even remotely address the power of a court to act *sua sponte*.⁶⁴ In fact, in *Porterfield*, the underlying issue was the standing of intervenors who were seeking to have the bankruptcy petition dismissed.

The *Coram* court cited several other cases as well. *In re Stahl, Asano, Shigetomi & Associates*,⁶⁵ was a case in which a debtor had filed a petition under Chapter XII of the former Bankruptcy Act and then while that case was still pending, filed a case under Chapter 11 of the new Bankruptcy Code. The result was two cases by the same debtor, under different laws, simultaneously pending in the same court. The Hawaii court dismissed the second petition, on the basis that to have two petitions pending simultaneously "would effectively paralyze the Court. The prospect of such a situation is adequate indication to the Court that it must have the inherent power to *sua sponte* protect itself and its processes from multiple petitions from the same debtor."⁶⁶ The court found solace in the generally expressed Congressional declaration that the period of transition between the old and new acts be orderly, and also in the fact that Congress had never expressly forbidden a court to act *sua sponte* when confronted with multiple petitions.

The *Stahl* court cited two cases as precedent for its ruling. In the first, *Freshman v. Atkins*,⁶⁷ a referee had recommended to the district court, as was the process then, that a debtor be denied a discharge. The debtor then filed a second petition in bankruptcy, and in that second proceeding sought to obtain his discharge. The court denied *sua sponte* the debtor's discharge in the second proceeding. The Supreme Court affirmed on the basis that the second petition

⁶³ Failure to fit within the statutory limitations on who may be a debtor has generally been held to be a jurisdictional defect. *See, e.g., Vallely v. Northern Fire Ins. Co.*, 254 U.S. 348 (1920); *Mulligan v. Federal Land Bank of Omaha*, 129 F.2d 438 (8th Cir. 1942).

⁶⁴ *Porterfield v. Gerstel*, 222 F.2d 137 (5th Cir. 1955).

⁶⁵ 7 Bankr. 181 (Bankr. D. Hawaii 1980).

⁶⁶ *Id.* at 186.

⁶⁷ 269 U.S. 121 (1925).

was an imposition upon and an abuse of the process of the court, if not as clear effort to circumvent the statute by enlarging the statutory limitation of time within which an application for a discharge must be made. In such a situation the court may well act of its own motion to suppress an attempt to overreach the due and orderly administration of justice.⁶⁸

The Court also found that an objection to discharge by an interested party *would* be a prerequisite if the court's action was the denial of a discharge of an individual debt, rather than an action which addressed the right of the debtor to have brought the second proceeding at all.⁶⁹ That case, then, addressed the court's right to remedy abuses of jurisdiction. It also involved an affirmative act—granting a discharge—which the court had been asked to perform. Neither a claimed jurisdictional defect, nor a requested affirmative action by the court were involved in *Stahl* or *Coram*.

The second opinion on which *Stahl* relied was *In re Northwest Recreational Activities*,⁷⁰ but that case did not relate at all to a court's acting *sua sponte*. That case, which dealt with whether or not a court could impose a requirement of "good faith" on the filing of Chapter 11 petitions, was also cited in *Coram*, and the *Stahl* court cited it for the general proposition that a court must be able to protect its "jurisdictional integrity." Thus *Stahl* does not seem to have constituted effective precedent for permitting a judge to act *sua sponte*.

Another opinion on which *Coram* relied was *In re Gale*.⁷¹ In *Gale*, the court first denied confirmation of a plan under Chapter 13. Finding that failure to have a plan confirmed was in turn a basis for dismissal or conversion to Chapter 7 under section 1307(c)(3) of the Code, the court then announced that it was going to convert the case to Chapter 7 on its own motion. In support of its authority to do so, the court cited language from the Senate report,⁷² but nowhere indicated that the Senate bill, which had provided for *sua sponte* actions, was never adopted as

⁶⁸ *Id.* at 124.

⁶⁹ *Id.* at 123.

⁷⁰ 4 Bankr. 43 (Bankr. N.D. Ga. 1980).

⁷¹ 8 Bankr. 960 (Bankr. D. Md. 1981).

⁷² Senate Report, *supra* note 8, at 5903.

law.⁷³ The *Gale* court also cited *In re Dutch Flat Investment Co.*,⁷⁴ which had nothing to do with the court's powers to act *sua sponte*.

No other authority cited in *Coram*, except *dictum* from *In re Pioneer Warehouse Corp.*, supports the proposition of a judge's ability to dismiss cases *sua sponte*. In fact, in a case cited in *Coram*, the Supreme Court's implication was the opposite. *S.E.C. v. U.S. Realty & Improvement Co.*⁷⁵ That case turned on the appropriateness of an order denying intervenors the right to be heard precisely so that their motion to dismiss a Chapter XI proceeding could be acted upon. Concern over their standing would hardly have been relevant if a court could act *sua sponte*. In short, the cases which at first reading appear to support the right of a judge to act *sua sponte* notwithstanding the requirement of a request by a party in interest have taken as their bases either *dicta* or cases which have involved filings in contravention of the court's jurisdiction.

In at least three reported cases, the courts have found that, notwithstanding that facts would have supported a dismissal if one were requested by a party in interest, they were unable to act *sua sponte*.⁷⁷ The *Kutner* case in fact may represent the other extreme. In that case, the court wrote an opinion stating that the debtor had clearly exceeded the statutory dollar limit for eligibility to file a Chapter 13 petition. Case law in this area is clear to the effect that exceeding the statutory limit is a jurisdictional defect. The trustee moved to dismiss, and for reasons not relevant to this article, the court held that the trustee did not have standing to so move. Accordingly it refused to dismiss.

The trustee then appealed the case to the Fifth Circuit, joined by the United States as *amicus curiae*, arguing that he did have

⁷³ 8 Bankr. at 963.

⁷⁴ 6 Bankr. 470 (Bankr. N.D. Cal. 1980). *Dutch Flat* was also cited in *In re Coram Graphic Arts*, 11 Bankr. at 644.

⁷⁵ 2 Bankr. 1 (Bankr. E.D.N.Y. 1979) (citing *dictum* from *In re Ettinger*, 76 F.2d 741 (2d Cir. 1935)).

⁷⁶ 310 U.S. 434 (1940).

⁷⁷ *In re Gurwitch*, 6 Bankr. Ct. Dec. (C.R.R.) 264 (Bankr. S.D. Fla. 1980); *In re Wiggles* (10%), 7 Bankr. 373 (Bankr. N.D. Ga. 1980) (the court indicated that it would have dismissed had it been asked); *In re Kutner*, 3 Bankr. 422 (Bankr. N.D. Tex. 1980).

standing to move to convert or dismiss, but that even if he didn't have standing, an order of dismissal was still appropriate on the basis of the court's inherent power to dismiss a case when jurisdiction was improper.⁷⁸ The Fifth Circuit dismissed the appeal on procedural grounds; the merits have not yet been addressed by an appellate court.⁷⁹

One case which has trod both sides of the line is *In re Tashman*,⁸⁰ where the court found that it did not have the right to dismiss *sua sponte* the Chapter 13 petition of an ineligible debtor. The court, at the end of its opinion, said that the debtor could be "redirected" into Chapter 11, and that the debtor "may in lieu of risking non-confirmation under Chapter 13, convert to Chapter 11 within 30 days. . . ."⁸¹

UNITED STATES TRUSTEES PROGRAM

Against this background, the United States Trustee program is of significance. The United States Trustees are officials of the Department of Justice charged with the administration of bankruptcy cases in eighteen judicial districts.⁸² Their functions are set forth in Chapter 15 of the Bankruptcy Code.

The role of the United States Trustee is to perform administrative functions, leaving the judges free to rule on contested

⁷⁸ See, e.g., *United States v. Corrick*, 298 U.S. 435, 440 (1935); *McNutt v. G.M.A.C.*, 298 U.S. 178, 184 (1935).

⁷⁹ *Stewart v. Kutner (In re Kutner)*, 656 F.2d 1107 (5th Cir. 1981).

⁸⁰ 13 Bankr. 549 (Bankr. D. Vt. 1981).

⁸¹ *Id.* at 551.

⁸² The Districts are as follows:

- (1) District of Maine, District of New Hampshire, District of Massachusetts, and District of Rhode Island.
- (2) Southern District of New York.
- (3) District of Delaware and District of New Jersey.
- (4) Eastern District of Virginia and District of District of Columbia.
- (5) Northern District of Alabama.
- (6) Northern District of Texas.
- (7) Northern District of Illinois.
- (8) District of Minnesota, District of North Dakota, and District of South Dakota.
- (9) Central District of California.
- (10) District of Colorado and District of Kansas.

Reform Act., § 1501.

issues, or on those issues specifically assigned to the court by the Bankruptcy Code. Examples of the responsibilities of the United States Trustees include appointing trustees in Chapter 7, 11 and 13 cases;⁸³ setting bonds for trustees;⁸⁴ appointing creditors' committees in Chapter 11 cases;⁸⁵ and insuring the appropriateness of deposits in banks.⁸⁶ The United States Trustees are assigned substantive duties as well. They specifically have the authority to move for the appointment of a trustee or an examiner in Chapter 11 cases.⁸⁷ They can investigate the appropriateness of granting a discharge to a debtor.⁸⁸ They can object to a debtor's discharge.⁸⁹ Most importantly, they are directed to "supervise the administration of cases and trustees in cases under Chapter 7, 11 or 13 of title 11."⁹⁰ Unfortunately, Congress never defined "administration," so occasionally a "territorial dispute" will arise. Generally, however, the ability of the United States Trustees to perform their functions has been unhampered, and in fact, has been welcomed by judges.

Examples of the supervision of administration, beyond that clearly set forth in the statute, include instances where, a request to borrow funds having been filed, the Trustees will object if no notice has been given to appropriate parties in interest. The United States Trustees have taken the position that it is not their role to make substantive decisions in lieu of creditors, such as whether the borrowing is sensible, but only to assure that the administrative procedures of the cases are effected properly, *e.g.*, insuring the fact of notice. Where a debtor is losing money, the United States Trustees will insure that the creditors' committee is aware of that fact, since the creditors committee is appointed by the Trustee.

Although there is some question as to whether the Trustee is a party in interest with the right to file a motion to convert or dismiss, he will move to convert or dismiss a Chapter 11 case if

⁸³ Reform Act, §§ 15701, 151104, 151302(a); 28 U.S.C. § 586(b).

⁸⁴ Reform Act, § 15322(b).

⁸⁵ Reform Act, § 151102.

⁸⁶ Reform Act, § 15345.

⁸⁷ Reform Act, § 151104(a).

⁸⁸ Reform Act, § 15727(a)(2).

⁸⁹ Reform Act, § 15727(a)(1).

⁹⁰ 28 U.S.C. § 586(a)(3).

the administration of the case has been significantly adversely affected, such as where the public health is threatened.

One of the major functions of the United States Trustee has been to insure that the trustees appointed by them perform competently, including the filing of all appropriate reports. Although this has alleviated the burdens of the judges in seventeen of the eighteen pilot districts, in Kansas the judges have issued a series of orders directing trustees to report to them on the ongoing administration of cases. The United States Trustee has objected to the court's order, and an appeal was taken to the United States District Court for the District of Kansas. The district court appeared to support the orders of the bankruptcy judges. In an often-rambling opinion relying on principles such as that the issuance of proposed rules and regulations of the Department of Justice "is contrary to the announced purpose of the present government to eliminate the adoption of rules and regulations designed to add limits and restraints to the business of handling the public's affairs." The court further ordered the "parties" to try to reach a settlement, and this process "was" still ongoing as of April, 1982. Therefore, the Kansas litigation has so far added nothing of significance to the reasoned law in this area.⁹¹

That case has focused the issues of administration. At least one bankruptcy judge during the oral argument on the United States Trustee's original objection to that order, indicated that he did not dispute the Trustee's right to administer cases, but pointed out that the statute did not explicitly remove the administrative responsibility from the bankruptcy judges. Hence, he reasoned, if the administration of a case collapses, he could still be "blamed." Other reasons asserted by the judges include section 107, which provides for all filings to be made public. The response of the United States Trustee is that papers filed with the Trustee are available to the public.⁹²

The Kansas cases probably represent one extreme: they were precipitated by a series of "midnight orders" directing every trustee in the district to physically appear in court and

⁹¹ *In re Alcaraz*, No. 81-1303 (D. Kan. Feb. 26, 1982).

⁹² Transcript of hearing Re: Summons and Order to Appear to Cary L. Standifer, et al., June 24, 1981.

advise the judges as to progress in the cases. The United States Trustee objected, on her own behalf as well as on behalf of the trustees, although she declined to direct the trustees—who are not government officials—to disobey the orders of the court.

In the only other case in which a possible conflict between the court's power and that of the United States Trustee became an issue, a bankruptcy judge on the request of debtor directed a Trustee to investigate the debtor's allegations that certain creditors should not be appointed to a creditors' committee because their claims were defective.⁹³ This the Trustee declined to do, asserting that his duties were independent of the court, and that it would be an intrusion by the Judiciary into the Executive branch for a court to direct that an investigation be performed by an arm of the Department of Justice.

In a recent decision on that matter, the bankruptcy appellate panel for the First Circuit reversed the bankruptcy judge. At the conclusion of its opinion, however, the panel issued the following *dictum*, apparently by way of solace to the bankruptcy judge whose order was thereby overturned: "If [the United States Trustee] fails to perform his statutory duties, the bankruptcy court has amply authority under § 105(a) of the Code to order him to act. . . . Therefore, he can and will be ordered to perform those tasks which the bankruptcy court determines fall within the scope of his responsibility. . . ." ⁹⁴ In issuing this *dictum*, the court cited no authority.

One final constellation of issues related to United States Trustees, although the problem relates as well to non-United States Trustee districts involved the filing of reports and concerns three provisions of law. Bankruptcy Rule 218 requires the filing of, *inter alia*, interim, *i.e.*, progress, reports. Section 1106(a)(4) requires that an examiner or trustee file a statement of any investigation conducted, "including any fact pertaining to

⁹³ *In re Kontaratos*, 10 Bankr. 370 (Bankr. D. Me. 1981).

⁹⁴ *Id.* at 373.

The dissent in *Kontaratos* cited *In re Stewart*, 10 Bankr. 472 (Bankr. E.D. Va. 1981), in which the court directed the United States Trustee to examine the conduct of an attorney. In that case, however, no issue had been raised during the hearing on the attorney's conduct, and in any event the Trustee elected not to appeal the order. That decision was made by the author in consultation with the Trustee.

fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor, or to a cause of action available to the estate.”⁹⁵

In describing the duties of trustees generally, section 704(7) directs that a trustee shall, “if the business of the debtor is authorized to be operated, file with the court and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the court requires.”⁹⁶

The problem is that these reports by their very nature, particularly those developed in Chapter 11 cases, will contain hearsay and opinions. The court will then read the very things which Congress took pains that it not be able to hear. In all of the United States Trustee districts except Kansas, the courts have indicated their disinclination to receive copies of the interim reports under Rule 218. With respect to reports by examiners, or by trustees in Chapter 11 cases, the issue appears more sensitive, but has not been raised by any court. Section 1106(a)(4)(A) of the Bankruptcy Code does direct that the trustee “file” any investigative statement, but the word “file” is not defined. This should be contrasted with section 704(7), which directs that a trustee “file with the court” the periodic reports.

No case has directly confronted the appropriateness of giving the court a copy of such reports, and the author can only suggest that this may yet be a matter for litigation in the future. When the author was Director of the United States Trustee program, potentially prejudicial reports were written in some cases by trustees or examiners. The compromise developed of advising the court that an investigatory statement existed, that copies has been disseminated to the various parties referred to in the statute, and that the court’s copy would be “filed” after the litigation which the report raised was terminated, or after a decision not to pursue litigation was taken. In non-United States Trustee districts, the same methodology may be appropriate.

With respect to the interim reports under Rule 218, the leading treatise on bankruptcy has suggested that these reports

⁹⁵ 11 U.S.C. § 1106(a)(4).

⁹⁶ 11 U.S.C. § 704(7).

should be filed with the United States Trustee and not the court.⁹⁷ With respect to section 704(7), one reading, consistent with the Congressionally expressed desire to exclude judges from administration, is that the principle of *eiusdem generis* would permit that section to be limited to statements that all taxes and tax returns were being timely filed.

In the United States Trustee districts, all responsibility for these reports have in fact become that of the Trustees; in non-United States Trustee districts, such as West Virginia, it is arguable that the trustee or the debtor-in-possession has the responsibility, and that until Congress fills the vacuum which it created, no reports should be filed, either with the court or otherwise. Arguing against this position would be the requirement of Rule 218 that the reports to be filed with *someone*, and that section 107 does suggest the right of public access to papers "filed." In the United States Trustee districts, the Trustees maintain offices open to the public; there would be no alternative public office in the non-pilot districts.

CONCLUSION

What Congress intended to create was a streamlined, new, and almost equal branch of the federal judiciary which would primarily focus on contested issues. With exceptions like approval of fees, or confirmation of plans of Reorganization, matters which were not presented in an adversary context were all relegated to the sphere of administrative duties—to be administered in some districts by United States Trustees, and in others, by anyone *other* than the judge. The problems from this concept have arisen on two fronts: first, in the districts which are not part of the United States Trustees system, the vacuum has frequently not been filled except in the most haphazard manner. clerks in many (although not all) districts simply do not have the standing or prestige, for instance, to insure that section 341 meetings of creditors are run in a tight, disciplined manner. Nor have they any logical, public method of filing appropriate papers with the judges for whom they work if the need arises to seek sanctions or compel cooperation by a debtor at a section 341 meeting. The task of telephoning or writing to creditors inviting them to participate as members of a creditors' committee is a mammoth task or—worse—is a task often handled

⁹⁷ 1 COLLIER ON BANKRUPTCY ¶ 6.18[3][a], at 6-88 (15th ed. 1981).

in non-United States Trustees districts superficially with no time to explain to creditors what service on a creditors' committee means.

The second set of problems, exacerbated in non-United States Trustees districts, is the old tradition of judges' believing that they have the total responsibility for all aspects of all cases. I have frequently heard competent, qualified judges refer to "my" case or "my" debtor. With the best intentions, there still lingers a paternalism, and a sensitivity to public criticism, which has made many judges resist the idea that they are no longer responsible for the ongoing administration of cases. Many have indicated that if cases collapsed, the press would castigate them, and that their theoretical disassociation from responsibility would never be accepted. It is that world-view which Congress had not considered sufficiently, and which has lead to phenomena such as the kind of strained reading of section 105 referred to in this article.

Starting April 1, 1984, bankruptcy judges will become Presidential appointees, with fourteen year terms.⁹⁸ That change was, however, premised on an enhanced role and jurisdiction of bankruptcy judges. That enhanced role is already under attack: The Chief Justice of the United States publicly lobbied against the enhancement;⁹⁹ an ad hoc committee of federal judges testified in Congress against the enhancement;¹⁰⁰ the Senate has, within the past year, explicitly refused to grant bankruptcy judges a pension any different from that of any run-of-the-mill federal employee (notwithstanding that all other federal judges, even including those in the Territories, like Guam, enjoy more generous pension rights).¹⁰¹ In addition, their enhanced jurisdiction is now under attack in the Supreme Court of the United States:¹⁰² in a brief in connection with those cases, a former

⁹⁸ This was effected by two provisions of the Reform Act. Section 201(a) made the substantive change by amending 28 U.S.C. § 152. Section 402(b) prescribes the effective date of April 1, 1984.

⁹⁹ Wash. Post, Oct. 7, 1978, at p. c1.

¹⁰⁰ House Committee Hearings.

¹⁰¹ 120 CONG. REC. 00000 (1978).

¹⁰² *United States v. Security Industrial Bank*, prob. juris. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-184); On June 28, 1982, the Supreme Court held that the Bankruptcy Reform Act unconstitutionally conferred Article III judicial power upon judges lacking the life tenure and protection against salary diminution. The Court's judgment of unconstitutionality was stayed until October 4, 1982, to give Congress an opportunity to restructure the bankruptcy courts without

Associate Justice of the Supreme Court has recently attacked bankruptcy judges sarcastically and with evident disrespect.¹⁰³

It is the suggestion of this article that the problems created by this vacuum in the non-pilot districts are immense, and were largely unforeseen by the Congress. Congress has the responsibility for reevaluating the United States Trustee pilot program before it expires on April 1, 1984.¹⁰⁴ The trend so far mandates either that the United States trustees system be made applicable nationwide, or else that judges be re-inserted into the entire administrative structure, recreating a system which had been so widely criticized prior to the passage of the Reform Act. If judges are again relegated to administration, with all of the exposure to ex parte communications and extra-evidentiary detail which that imports, then the prestige of the court and the quality of the judges will likely suffer.

More rides on the acceptance by bankruptcy judges of their new role than many may appreciate. Even if the Supreme Court rules that their enhanced jurisdiction is inappropriate, that still may not relate to the concept that judges should not become involved in administrative matters. If the Supreme Court rules adversely on the issue of jurisdiction, the opponents of bankruptcy judges—who often seem legion with the ranks of the federal judiciary—may seize that as an opportunity to continue the rest of the attack on bankruptcy judges, which would include relegating them to administration, and lessening their prestige. Accordingly, it is in the mutual interests of both practitioners and bankruptcy judges to treat the practice the same as that in a United States District Court—on the merits, with no needless judicial involvement, strictly by the letter of the law.

It will not be long before Congress will have to decide how or whether to change bankruptcy practice. In the meantime, the wise practitioner will read the statute and learn the rules, but he or she will also bear in mind the history of the palimpsest which is bankruptcy practice.

an interruption in their operation. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 50 U.S.L.W. 4892 (1982).

¹⁰³ Brief in support of motion to consolidate *United States v. Security Industrial Bank* with *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* Motion denied, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981).

¹⁰⁴ Reform Act, § 408.

